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In the Supreme Court of the United States
OCTOBER TERM, 1978

TRUSTEES OF BOSTON UNIVERSITY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 35-55) is reported at 575 F. 2d 301. The decision and order of the National Labor Relations Board (Pet. App. 57-75) are reported at 228 N.L.R.B. 1008.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1978. The petition for a writ of cer-

(1)

tiorari was filed on July 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board reasonably exercised its discretion to define appropriate bargaining units by excluding the law, medical and dental faculties from a unit of faculty members at the University.
2. Whether there was substantial evidence to support the Board's finding that the University's department chairmen were "employees" and not "supervisors" within the meaning of the National Labor Relations Act.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151, *et seq.*, are set forth at Pet. App. 119-120.

STATEMENT

1. Boston University is a private, non-profit educational institution governed by a board of trustees.¹

¹ An executive committee of the board of trustees determines wages and other compensation for all University personnel, reviews the budget prepared by the President, recommends the budget to the trustees, and approves expenditure requests supplemental to the approved budget (Pet. App. 82; Er. Exh. 1 (p. 580), 140). "Tr." references are to the transcript of the Board's bargaining unit hearing; "Bd. Exh." "Pet. Exh." and "Er. Exh." refer to the exhibits introduced at that hearing by the Board, the Union and the University.

Management of University affairs is delegated by the trustees to the president, his assistant and vice-presidents, and the deans responsible for each school or college (Pet. App. 82-83). Each dean prepares his school's budget, supervises its curriculum, maintains its academic standards, and recommends to the president and the board of trustees the hiring, promotion, and tenure of faculty within the school (Pet. App. 83, 90, 91).

Several of the schools are divided into departments. The dean appoints department chairmen, usually from among department faculty members. The University's *Faculty Manual* requires the dean to consult with the tenured full professors of the department before appointing a chairman (Pet. App. 85). While holding their position, chairmen continue to serve as faculty members (Pet. App. 86, 94); they teach (Tr. 2461, 2666-2667), conduct research and write (Tr. 1331, 2294-2295, 2666), participate in committee work (Tr. 2112-2114, 3054), and advise students (Tr. 1148, 2667, 2925). They have standard 9-month faculty contracts, unlike the 12-month contracts held by administrators (Tr. 2320, Pet. Exh. 43 (p. XI-1)), and participate in the same fringe benefits as other faculty members (Tr. 1915-1917). Chairmen are listed in the various school catalogs as faculty rather than administrators (Pet. App. 94). Although department chairmen receive a stipend in addition to their salaries, they do not necessarily hold the highest academic rank nor do all have tenure (Pet. App. 94; Tr. 987, 1243-1244, 2459,

2935). Department chairmen enjoy a reduced teaching load, as do faculty members participating in committee and other academic work (Pet. App. 94; Tr. 714, 1990, 2074, 2160-2162). A few department chairmen have accepted administrative posts, but the vast majority have returned to regular faculty status following their terms (Pet. App. 94).

The appointment of full-time faculty members is by approval of the trustees upon written recommendation of the president, the academic vice-president and the dean concerned (Pet. App. 87; Er. Exh. 140, art. IV, § 5). The *Faculty Manual* provides that the department chairman may recommend appointments "but only after consultation by him with all full professors with tenure of that Department" (Pet. App. 87).² The *Faculty Manual* also requires the department chairman to consult with a committee of all tenured department members in recommending to the dean the reappointment of non-tenured faculty (Pet. App. 89; Er. Exh. 133 (p. 3); Pet. Exh. 436 (p. III-5)). Similarly, faculty consultation is required for

² In all but the most exceptional circumstances chairmen will not recommend a candidate for full-time appointment in the absence of faculty approval (Tr. 1131, 2052, 2100, 2175, 2298-2299, 2411-2413, 2569-2570, 2597-2598, 2671-2672, 2943, 3055-3058). Moreover, chairmen do not have the power to veto a faculty recommendation (Tr. 2296, 2447; Pet. Exh. 21, 28). Part-time faculty members are hired upon approval of the dean after recommendation by the department chairman. Generally, chairmen consult with faculty members prior to making such a recommendation, although they act with somewhat broader discretion in recommending part-time teachers (Pet. App. 88).

tenure and promotion recommendations (Pet. App. 89).³

Department chairmen do not effectively recommend discipline of either tenured or untenured faculty (Pet. App. 90-91). Nor do they direct faculty in the performance of their academic duties. The responsibility for academic matters rests with the faculty (Pet. App. 92). The chairman or other faculty member compiling course schedules solicits each faculty member's course and time preferences before determining these matters (Pet. App. 92).

Department chairmen have only a limited role in recommending annual salary adjustments. The adjustments are generally made within guidelines established by the dean, the administration, or by the faculty (Pet. App. 91). Nor does the chairman play an independent role in either formulating or administering the budget (Pet. App. 91). Administration of the department budget is largely ministerial; the chairman must generally obtain prior approval from the dean before exceeding any line item or transferring funds between lines (Pet. App. 91-92).

Chairmen do not significantly supervise departmental support personnel or other assistants. Even in departments with large numbers of secretaries

³ Every school has either a departmental or school-wide promotion and tenure committee which makes an independent recommendation (Pet. App. 90). Several departmental recommendations have been rejected by either a school-wide faculty committee or the dean (Tr. 964-966, 1017-1020, 1130, 2107, 2182, 2539-2541) or by the president or the president's tenure committee (Tr. 1314, 1352, 2110, 2455-2456).

and technicians the chairmen spend 5-10 percent of their time supervising support staff (Pet. App. 95, 44 n.4). The chairman's supervisory authority is limited by university personnel policies (Tr. 1096-1097) and evaluation of support personnel is usually discussed with faculty members or delegated to administrative assistants (Tr. 1215-1217, 2008-2010, 2510, 3069-3070). Graduate research assistants, teaching assistants, and teaching fellows are selected by individual faculty members or by a faculty committee, not by the chairmen (Tr. 1137, 2771, 2817).

2. The University consists of sixteen schools and colleges, fourteen of which, including the law school, are located on the University's main campus (Pet. App. 79). The law school is a separate facility both physically and administratively. The school occupies a separate block of eight floors in a building on the main campus and has a separate entrance, lobby, and elevators (Pet. App. 107). The school has a separate admissions office and registrar, maintains its own records (Pet. App. 108) and makes independent recommendations for financial aid (Tr. 2638-2642). It also has an academic calendar different from the rest of the university (Pet. App. 108). The law school has significant financial resources; its endowment is exceeded only by that of the Schools of Medicine and Graduate Dentistry (Pet. App. 108-109). The law school has formed a separate alumni organization that solicits funds solely for the use of the law school. Unlike the other schools on the main campus, the law school does not divide its contributions with

the rest of the University (Pet. App. 109). Due, in part, to the law school's generous endowment, the average salary of law school faculty members during the 1974-1975 academic year was \$27,000, while the average faculty salary was \$17,000 (Tr. 141-144; Pet. Exh. 1, 44). Unlike faculty members in other schools, law school faculty members are generally hired after several years of practice and begin work as associate (rather than assistant) professors. They generally receive tenure in three years while faculty members at the other schools generally receive tenure in six years (Pet. App. 107).

The medical and dental schools are located in another part of the City of Boston more than one mile away from the main campus (Pet. App. 79). The medical and dental schools and the university hospital are consolidated into the Boston University Medical Center and are administered by a Center Trustee Council (Pet. App. 110-111). Decision-making and the general operation of support services including accounting, personnel, purchasing, disbursement and building are decentralized from the University, and are merged in the Medical Center (Pet. Exh. 42, art. VIII, §§ 5-6). The Medical Center engages independently in the solicitation and administration of grants (*id.*, art. VIII, § 7). The medical and dental schools maintain their own records and determine their own admissions policies (Tr. 2626, 2646). The Medical Center and the two affiliated schools are financially independent of the University (Pet. App. 111-112; Pet. Exh. 42, art.

VIII, § 1; Tr. 1930-1931). The medical and dental schools have far larger endowments than the other schools in the University, and receive more money from grants and research contracts than the other schools (Pet. App. 114). Like the law school, but unlike the other schools in the University, the medical and dental schools do not share the contributions they receive with the rest of the University (Tr. 2381). A majority of the members of the medical school faculty receive more than 50 percent of their salary from sources other than the University, unlike the faculty members in other schools (Pet. App. 112; Tr. 1528-1529, 1933-1940, 1954; Er. Exh. 144). Likewise, at the dental school, of 200 listed faculty members, only 4 are considered full-time teachers, and nearly all receive most of their income from outside sources (Pet. App. 112). Including income from outside sources, the faculty at the medical and dental schools earn substantially more than the faculty at the rest of the University (Tr. 2720). Because most faculty members engage in private medical and dental practice, teaching schedules are specially arranged between the individual faculty member and the dean (Tr. 1964, 1930, 1951-1952).

3. In October 1974, the Union⁴ filed a petition requesting an election among the University's full-time teaching faculty including department chairmen but excluding the faculties of the law, medical

and dental schools (Pet. App. 37). Following an extensive hearing, the Board's Regional Director rejected the University's contentions that the department chairmen were "supervisors" rather than "employees" and that the faculty of the three professional schools should be included in the unit. The Regional Director found that department chairmen neither directly supervised other faculty members nor made independent effective recommendations regarding their employment. The Director further found that the minimal supervision exercised by chairmen over non-faculty personnel such as secretaries and research assistants was insufficient to render them supervisors within the meaning of the Act. (Pet. App. 94-95.) The Director excluded the faculties of the three professional schools because those schools were largely autonomous; because they had separate facilities and financing; and because the economic interests of their faculties were distinct from those of the other University faculties due to their substantial outside employment and significantly higher salaries (Pet. App. 107-115).

The Board denied the University's request for review (Pet. App. 118). The Union won the ensuing representation election and was ultimately certified as the exclusive bargaining representative (Pet. App. 60-62). When the University refused to bargain with the Union, the Board, on summary judgment, found it in violation of Section 8(a)(5) and (1) of the Act and ordered the University to bargain with the Union (Pet. App. 57-75).

⁴ Boston University Chapter, American Association of University Professors.

4. The court of appeals affirmed the Board's findings and enforced its order (Pet. App. 35-55).

Concerning the asserted supervisory or managerial status of department chairmen, the court noted that this question depends on "the degree of control exercised by chairpersons over other bargaining unit personnel and the relative amount of interest they have in furthering the policy of the administration as opposed to the members of the bargaining unit" (Pet. App. 42). The court found substantial evidence to support the Board's findings that the chairmen did not exercise control over the faculty and that the recommendations of department chairmen were the "result of * * * consultation [with the faculty]" and were made "in the interest" of the faculty, not of the employer" (Pet. App. 43). The court emphasized that "the selection process for department chairpersons is such that they represent the interests of the tenured professors of the department rather than the University" (Pet. App. 44). With regard to supervision of non-unit personnel, the court noted that "the time spent in [these] supervisory duties 'reached a maximum of five to ten percent among the many chairmen who testified'" (Pet. App. 44 n.4).

The court also held that the Board's exclusion of the three professional schools was not "arbitrary" and rested "on substantial evidence" (Pet. App. 45-48). It agreed with the Board that there are "significant differences between [these schools] and the other graduate schools included in the bargaining unit" (Pet. App. 46).

ARGUMENT

The Board's determinations, affirmed by the court of appeals, that the faculties of the law, medical and dental schools should be excluded from the bargaining unit and that the department chairmen should be included, depend on the facts of this particular case and constitute a reasonable exercise of the Board's discretion in determining representation matters. Further review of the essentially factual determinations of the Board is not warranted.

1. Section 9(b) of the Act directs the Board in each case to define the appropriate unit for collective bargaining "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act." As this Court observed in *Packard Motor Car Co. v. National Labor Relations Board*, 330 U.S. 485, 491 (1947), the determination is a factual one, "involv[ing] of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed." Accord, *South Prairie Construction Co. v. Local 627, Operating Engineers*, 425 U.S. 800, 805 (1976). As the court of appeals noted, the burden is on the party opposing the Board's determination to show that the unit selected is "clearly not appropriate" (Pet. App. 45, citing *Banco Credito v. National Labor Relations Board*, 390 F. 2d 110, 112 (1st Cir.), cert. denied, 393 U.S. 832 (1968)). For in making unit determinations, "[t]he Board often must choose among several alternative units, each of which may

have rational foundations." *Local 1325, Retail Clerks International Association v. National Labor Relations Board*, 414 F. 2d 1194, 1198-1199 (D.C. Cir. 1969). The Act does not require that the unit designated by the Board be the "most" appropriate unit; "the existence of alternative units which are 'appropriate' will not alone warrant reversal if the Board has chosen some other unit which is also appropriate" (*id.* at 1202).

2. Petitioner's argument that the faculties of the medical, dental and law schools were improperly excluded from the bargaining unit is based largely on its assertion (Pet. 13) that the "faculty at these three Schools share with their colleagues elsewhere at the University a far greater similarity than dissimilarity of employment conditions and concerns."⁶ Petitioner's argument merely quarrels with the Board's contrary factual finding, which the court

⁶ Petitioner points out (Pet. 17) that the Board has previously included a dental school in a university-wide unit (*Fairleigh Dickinson University*, 205 N.L.R.B. 673 (1973)) and urges, on that basis, that the Board's decisions are "inconsistent" (Pet. 17 n.7). However, as noted above, unit determinations turn on their particular facts. In *Fairleigh Dickinson*, unlike the present case, the dental school was not under the operation of a separate medical center and university-wide policies of tenure and promotion were applicable. See also, *University of Miami*, 213 N.L.R.B. 634 (1974); *Syracuse University*, 204 N.L.R.B. 641 (1973), and *Fordham University*, 193 N.L.R.B. 134 (1971), where medical and law schools were excluded from overall faculty units.

of appeals affirmed, and raises no issue for this Court.⁸

In any event, the Board's findings are amply supported by the record. As noted above, the medical and dental schools occupy a separate campus, have separate facilities, and are part of a separate organization—the University Medical Center. Although located on the main campus, the law school also maintains essentially separate facilities. All three schools have significant independent resources. As the court of appeals noted, these elements are important "in determining what the faculties of the respective schools can realistically expect from collective bargaining" (Pet. App. 47). In addition, these professional faculties are economically distinct from other University faculties due to their substantial outside employment and far higher salaries.

There is no merit to petitioner's further contention (Pet. 17-20) that the Board's exclusions interfere with the existing system whereby the entire faculty participates significantly in governing the University as a whole. Designating a collective bargaining agent to represent an economically distinct group of faculty

⁸ See, e.g., *Beth Israel Hospital v. National Labor Relations Board*, No. 77-152 (June 22, 1978), slip op. 23: "'Whether on the record as a whole there is substantial evidence to support agency findings is a question Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.'"

members does not deprive other groups of their traditional ability to participate in university affairs. Moreover, the only university-wide governance body, the University Senate, considers only academic and professional—not budgetary or administrative—matters affecting more than one school, and can only recommend, not institute, action. The certification of a bargaining representative will not affect the operation of that body (Pet. App. 97).

3. As the court of appeals pointed out (Pet. App. 42), supervisory or managerial status turns on "the degree of control exercised * * * over other bargaining unit personnel" ⁷ and whether the employees in question serve as representatives of management or of other bargaining unit members. Petitioner argues that department chairmen possess a large degree of such control and function as management representatives. The Board, upheld by the court of appeals, found otherwise. This factual issue does not warrant further review in this Court. "The Board's findings are 'entitled to the greatest deference in recognition of its special competence in dealing with labor problems.'" *American Broadcasting Companies, Inc.*

⁷ Section 2(11) of the Act defines a "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

v. *Writers Guild of America*, No. 76-1121 (June 21, 1978), slip op. 21. The court of appeals properly concluded that substantial evidence supported the finding that department chairmen do not exercise significant authority over other faculty members, and that they do not serve as representatives of the University as opposed to other members of the bargaining unit.⁸ Instead, the department chairmen

⁸ Petitioner argues (Pet. 21-22 and n.15) that the Board's decision here and in *Fordham University*, 214 N.L.R.B. 971 (1974), cannot be distinguished from cases in which the Board has found department chairmen to be supervisors. But as the Board pointed out in this case, "'we are not persuaded, on the basis of our experience to date with university cases in which their supervisory status is in issue, that faculty department heads generally have or exercise supervisory authority * * * [a]nd we see no reason at this time to depart from our usual practice of requiring an affirmative showing that the disputed faculty department heads have been given one or more of the indicia of supervisory authority set forth in Section 2(11) [of the Act] * * *'" (Pet. App. 85).

In other contexts, of course, the Board has found department chairmen to possess supervisory authority. Thus, in *C. W. Post Center*, 189 N.L.R.B. 904, 906 (1971), and *Long Island University (Brooklyn Center)*, 189 N.L.R.B. 909 (1971), the Board found that the chairmen "exercise the authority to make effective recommendations as to the hiring and change of status of faculty members." In *Adelphi University*, 195 N.L.R.B. 639, 642 (1972), the chairmen allocated merit raises in their departments. In *Syracuse University*, 204 N.L.R.B. 641, 642 (1973), in addition to exercising control over departmental assignments and "monetary benefits," the chairmen "serve in * * * permanent status * * * some do no teaching at all, and * * * there is a definite line of progression from department chairman into college and university executive positions." And in *Fairleigh Dickinson University*, 205 N.L.R.B. 673, 675 (1973), the Board found that the chairmen "have

were shown to share a community of interest with their fellow faculty members, stemming from the long tradition of collegial responsibility and decision-making in the university (Pet. App. 85-93).⁹

Nor is there merit to petitioner's contention (Pet. 26-33) that the chairmen should be excluded from the unit because of their supervision of non-unit employees. The Board has repeatedly held that employees who incidentally supervise non-unit personnel and are not otherwise allied with management should not be considered supervisors under the Act. *Adelphia University*, 195 N.L.R.B. 639, 644 (1972); *University of Chicago*, 205 N.L.R.B. 220, 223 (1973), enforced, 506 F.2d 1402 (7th Cir. 1974); *Westinghouse Electric Corp.*, 163 N.L.R.B. 723, 727 (1967), enforced, 424 F.2d 1151 (7th Cir.), cert. denied, 400 U.S. 831 (1970). The Board's rule strikes an appropriate balance between the explicit right of professional employees under the Act to employee

substantial responsibility for the hiring of new faculty members and the retention of faculty members who have not yet attained tenure."

⁹ Contrary to petitioner's argument, the Board's decision does not "pervert 'collegiality'" (Pet. 25) or require the University to "change its basic system of administration" (Pet. 26). Rather, the Board's decision to include chairmen in the bargaining unit is based on the actual practice of the University and the fact that chairmen and faculty make decisions on a collegial basis. Under these circumstances, to exclude the chairmen and thus separate them from their fellow faculty members would not comport with current university practices and would unjustifiably deprive the chairmen of their rights under the Act.

status (Section 2(12) of the Act) and the interest of management in the loyalty of truly supervisory personnel.¹⁰ To hold otherwise would substantially curtail the right to representation of professional employees who customarily direct secretarial, technical and other support personnel as a necessary but incidental part of their job. See *Westinghouse Electric Corp. v. National Labor Relations Board*, 424 F.2d 1151, 1156-1158 (7th Cir. 1970), cert. denied, 400 U.S. 831 (1970). The court of appeals properly approved the application of the Board's rule here, noting that the chairmen spend at most only 5 to 10 percent of their time in such duties.¹¹

¹⁰ While petitioner argues for a different interpretation of the Act, "[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *National Labor Relations Board v. International Association of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 350.

¹¹ In its supplemental brief, petitioner contends that the decision of the Second Circuit in *National Labor Relations Board v. Yeshiva University* (No. 77-4182, July 31, 1978), 98 L.R.R.M. 3245, is in conflict with the instant case. There is no merit to that contention. In *Yeshiva*, the Second Circuit held that the entire full-time faculty of the university were supervisory or managerial employees. No such issue was raised here; indeed petitioner conceded throughout the instant proceeding that its full-time faculty constituted an appropriate bargaining unit, but contended that department chairmen should be excluded based on their alleged supervisory status. The Second Circuit in *Yeshiva* itself noted the limited scope of the instant decision. 98 L.R.R.M. at 3252 n.9.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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